RECENT CASE NOTES

ADMIRALTY—AFFREIGHTMENT CONTRACTS—PREPAID FREIGHT UNRECOVERABLE ALTHOUGH VESSEL DID NOT SAIL.—A sailing vessel in New York had loaded a cargo for Bordeaux and was about to sail when the Government embargoed all voyages of sailing vessels to the war zone. The ship thereupon discharged the cargo. The freight had been prepaid, under a bill of lading containing the clause "Freight . . . to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost," and the usual "restraint of princes" exception. The cargo-owners libelled the vessel for the return of the prepaid freight. *Held,* that they were not entitled to recover. Hand, J., *dissenting. The Gracie D. Chambers* (1918, C. C. A. 2nd) 253 Fed. 182.

On analogous facts, a similar result was reached in *The Bris* (1918, S. D. N. Y.) 253 Fed. 259.

It is admitted that in these cases the freight had not been earned and, if not prepaid, could not have been recovered by the shipowner. *The Tornado* (1882) 108 U. S. 342, 2 Sup. Ct. 746. Even though prepaid, if the voyage remain uncompleted without any participation in the default by the cargo-owner, the prepaid freight may in the United States be recovered from the shipowner. *Watson v. Duykinck* (1808, N. Y. Sup. Ct.) 3 Johns. 335; *Griggs v. Austin* (1825, Mass.) 3 Pick. 20. The decision in the instant case, therefore, must rest on the exceptional agreement to the contrary in the bill of lading, and to reach this conclusion the majority interpolated the word "retained" after "irrevocably," to make the phrase read "irrevocably retained." An analogous, though less doubtful, clause was similarly construed in *National Steam Nav. Co. v. International Paper Co.* (1917, C. C. A. 2nd) 241 Fed. 861. This concededly inequitable result of denying the recovery by the shipper of unearned but prepaid freight is reached in England without any special agreement to that effect. *Coker v. Limerick S. S. Co.* (1918, H. L.) 34 Times L. R. 296. The Court of Exchequer has admitted that the rule is unsatisfactory in principle but considered it too well-established to overrule. *Byrne v. Schiller* (1871, Exch.) 1 Aspinwall Mar. Cas. 111. The dissenting judge in the instant case, in view of the doubtful wording of the clause, construed it to apply only after the vessel had broken ground. See *The Tornado* (1882) *supra,* at p. 349 (as to time of commencement of the contract of affreightment), and *The Allanwilde* (1917, D. N. J.) 247 Fed. 236 (where the vessel put back to port on account of distress). The court's *dictum* that "freight is earned only upon delivery of cargo" has many exceptions; it does not apply, for example, where *force majeure* terminates the voyage before completion, the shipper waiving delivery or voluntarily accepting his cargo at an intermediate port, or where the non-delivery is in part due to the act or default of the shipper. See *The Nathaniel Hooper* (1839, C. C. Mass.) Fed. Cas. 10,032, an able opinion by Mr. Justice Story; *Hunter v. Prinsep* (1808, K. B.) 10 East 378, 394; *Cargo ex Galam* (1863) 33 L. J. Adm. 97.

ALIEN ENEMIES—SUIT IN NEUTRAL FORUM—CHANGE IN STATUS OF FORUM FROM NEUTRALITY TO BELLIGERENCY PENDING APPEAL.—The plaintiff, a British company, sued out a libel in the federal District Court in New York against a vessel there in port belonging to the defendant, an Austrian company, to enforce payment for coal delivered at Algiers by the plaintiff to the defendant before the declaration of war between Great Britain and Austria. From a

judgment dismissing the libel an appeal was taken. While it was pending, war on Austria was declared by the United States. *Held,* that in view of the change of status of the United States from neutrality to co-belligerency with the plaintiff's country against the defendant's country, the decree of dismissal must be reversed, but that action upon the libel should be suspended until peace should remove the difficulty of communication between the defendant's officers in Austria and its American counsel. *Watts, Watts & Co. Ltd. v. Unione Austriaca di Navigazione* (1918, U. S.) 39 Sup. Ct. 1.

The case is divisible into two distinct parts, covering (1) the period of American neutrality, and (2) the period of belligerency. A United States court is privileged in its discretion to assume jurisdiction over a suit between foreigners, although the contract out of which it arose was made and was to be performed in a foreign country. Such jurisdiction is usually assumed unless reasons of expediency or treaty provisions forbid. *The Elwine Kreplin* (1872, D. C. E. D. N. Y.) 9 Blatch. 438 (treaty). Reasons of expediency forbid the assumption of jurisdiction, for example, when access to the national courts of the parties is easy, the cause of action being governed by their national law, and when the suit is for seamen's wages. See *Montalet v. Murray* (1807, U. S.) 4 Cranch, 46 (suit on promissory notes made in St. Domingo); *Willendson v. The Försöket* (1801, D. C. Penn.) 1 Pet. Adm. 197 (seaman's suit for wages); see also *Panama Railroad Co. v. Napier Shipping Co.* (1896) 166 U. S. 280, 285, 17 Sup. Ct. 572. Jurisdiction is never declined where the case arises *communis juris* and involves the application of law common to all nations. *Mason v. Blaireau* (1804, U. S.) 2 Cranch 240, 264 (salvage); *The Belgenland* (1884) 114 U. S. 355, 365, 5 Sup. Ct. 860 (involving a collision on the high seas between foreign vessels) and other cases there cited. Inasmuch as in the instant case the general rule of international law and the law of the country of the plaintiff, of the defendant and of the forum were in harmony, to the effect that the payment of money during war by the subject of one belligerent to the subject of another is unlawful, it is unquestionable that the District Court had power to assume jurisdiction, although the refusal to exercise it to enforce payment by the defendant during the war was a proper use of its discretion as a court of a neutral nation. This was the ground of decision dismissing the libel. See 224 Fed. 188. After war broke out between the United States and Austria, the legal situation of the parties changed. The case became a suit by one belligerent in the court of a co-belligerent against a common enemy. The refusal to exercise jurisdiction must then rest on other grounds. It is a common rule that in the case of contracts executed prior to war, a state of war does not render them void, but merely suspends the remedy for their enforcement. *Ex parte Boussmaker* (1806, Ch.) 13 Ves. 71. This rule suspends suits brought by alien enemy plaintiffs. Plaintiffs are also barred by the rule that non-resident alien enemies have no standing *in judicio.* Neither rule grants to alien enemy defendants immunity from suit. See *Robinson v. Continental Insurance Co.* [1915] 1 K. B. 155, 161; *McVeigh v. United States* (1870, U. S.) 11 Wall. 259, 267; and article by C. M. Picciotto in (1917) 27 YALE LAW JOURNAL, 167, 173. But principles of civilized justice require that an enemy defendant have full opportunity to be heard in defence and to communicate with counsel. *Windsor v. McVeigh* (1876) 93 U. S. 274, 280; *The Kaiser Wilhelm II* (1917, C. C. A. 3rd) 246 Fed. 786, 790. This principle was applied by the Supreme Court in the instant case, notwithstanding a stipulation as to the facts and the proof of foreign law entered into at the beginning of the suit by the defendant's counsel. The decision is novel but seems in accord with established principles.